avoid paying their income taxes so that the readers will buy other products in [petitioner's] line." *Id.* at 11. The court concluded that "*The Federal Mafia* is an integral part of [petitioner's] whole program to market his various products for taxpayers to utilize his forms and techniques to avoid paying income tax." *Id.* at 12.

Having thus defined the commercial-speech components of petitioner's book, the court of appeals next determined that "the expressive and political portions of *The Federal Mafia* are not 'inextricably entwined' with its commercial elements." Pet. App. 14. Petitioner, the court noted, "can relate his long history with the IRS and explain his unorthodox tax theories without simultaneously urging his readers to buy his products." *Ibid.* "Because the protected and unprotected parts of the book are not inextricably intertwined," the court reasoned, "[petitioner] cannot use the protected portions of *The Federal Mafia* to piggy-back his fraudulent commercial speech into full First Amendment protection." *Ibid.*

Finally, the court of appeals determined that the commercial speech contained in petitioner's book was fraudulent and therefore could be enjoined. Pet. App. 16. The court noted that, "[a]lthough [petitioner's] claims are far-fetched, they could mislead a customer into believing that he or she could use [petitioner's] products to legally stop paying income taxes." *Ibid.* Because the court concluded that the injunction was valid as a restriction on false and misleading commercial speech, it did not reach the district court's alternative bases for rejecting defendants' First Amendment claim: namely, that the injunction was also valid as a restriction on speech that incites imminent lawless action and that aids and abets criminal activity. *Id.* at 16-17.

ARGUMENT

Petitioner contends (Pet. 10-18) that the court of appeals erred by rejecting his First Amendment challenge to the preliminary injunction entered by the district court. The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly concluded that the injunction could properly be applied to petitioner's book to the extent that it contained fraudulent or deceptive commercial speech. This Court has repeatedly made clear that false, fraudulent, or deceptive commercial speech, or commercial speech related to illegal activity, is unprotected by the First Amendment. See, *e.g.*, *Ibanez* v. *Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994); *Edenfield* v. *Fane*, 507 U.S. 761, 768 (1993); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563-564 (1980).

Petitioner does not deny that the speech at issue was fraudulent or deceptive. Instead, he contends that the court of appeals' decision "seems to conflict with the Supreme Court's definition of 'commercial speech,'" Pet. 10, and that "commercial speech" should be "limited to 'advertising pure and simple,'" Pet. 11. Those contentions lack merit.

This Court has stated that the "core notion of commercial speech" is "speech which does no more than propose a commercial transaction." *Bolger* v. *Youngs Drugs Prods. Corp.*, 463 U.S. 60, 66 (1983) (citation omitted). At times, however, the Court has "also suggested that * * * lesser protection was appropriate for a somewhat larger category of commercial speech—'that

is, expression related solely to the economic interests of the speaker and its audience.'" *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 422 (1993) (quoting *Central Hudson*, 447 U.S. at 561). Although the Court has not yet established "the precise bounds of the category of expression that may be termed commercial speech," *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985), it has never held that commercial speech comprises *only* "advertising pure and simple," as petitioner contends, but has instead held that a variety of other types of material constitutes commercial speech. See, *e.g.*, *Bolger*, 463 U.S. at 66-67 (informational pamphlets); *Friedman* v. *Rogers*, 440 U.S. 1, 11 (1979) (trade names).

This case is a poor vehicle for resolving any residual uncertainty as to the extent to which the category of commercial speech encompasses more than speech that merely proposes a commercial transaction. Although the court of appeals recognized (Pet. App. 10) that "[m]uch thought has gone into the question of what the Supreme Court really meant by the [larger] category of commercial speech" to which the Court referred in *Central Hudson*, the court of appeals did not purport to delineate the bounds of that category in this case. Instead, the court merely noted that petitioner's book contained commercial speech under any definition. Compare Pet. App. 9 (noting that portions of petitioner's book constituted commercial speech "[u]nder [petitioner's] definition"), with *id.* at 11 (suggesting that petitioner's "[e]xtravagant claims" constituted commercial speech under the broader definition set forth in *Central Hudson*). Moreover, the court of appeals did not suggest that the injunction would have been overbroad under any valid narrower definition of commercial speech, nor

does petitioner challenge any particular provision of the injunction as overbroad. Because the court of appeals' decision does not conflict with any decision of this Court concerning the definition of commercial speech, and because there is no indication that the court of appeals would have reached a different outcome even if it had expressly adopted a narrower definition, this Court's intervention is unwarranted.[1]

2. The court of appeals correctly upheld the injunction notwithstanding the fact that petitioner's book indisputably contains some fully protected speech. Where commercial speech is "inextricably intertwined" with otherwise fully protected speech, it is entitled to the fullest First Amendment protection. See, *e.g.*, *Board of Trs.* v. *Fox*, 492 U.S. 469, 474 (1989). A speaker, however, cannot "immunize false or misleading product information from government regulation simply by including references to public issues." *Bolger*, 463 U.S. at 68 (citation omitted); see *Zauderer*, 471 U.S. at 637 n.7.

The court of appeals determined that the commercial-speech component of petitioner's book was not "inextricably intertwined" with the fully protected component, because petitioner could "relate his long history with the IRS and explain his unorthodox tax theories without simultaneously urging his readers to buy his

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[1] Petitioner also suggests (Pet. 10, 12-14) that the court of appeals' decision conflicts with its earlier decisions in *American Academy of Sch. Management* v. *Joseph*, 353 F.3d 1099 (9th Cir. 2004); *Mattel, Inc.* v. *MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002), cert. denied, 537 U.S. 1171 (2003); and *Hoffman* v. *Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001). This Court, however, does not sit to resolve alleged intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, those decisions do not clearly adopt a different definition of "commercial speech" from that used in the decision below.

products." Pet. App. 14. Petitioner does not contend that the court of appeals' decision on that issue conflicts with any decision of this Court or of another court of appeals. To the contrary, courts of appeals have consistently upheld injunctions under 26 U.S.C. 7408 as permissibly regulating fraudulent or deceptive commercial speech—including in cases where, as here, the materials giving rise to the injunction contained both commercial speech and speech that was fully protected. See, *e.g.*, *United States* v. *Raymond*, 228 F.3d 804, 807, 815 (7th Cir. 2000) (materials providing information regarding "general tax-protest principles" and "forms and instructions that guide the purchaser through the process of 'de-taxing'"); *United States* v. *White*, 769 F.2d 511, 512, 516-517 (8th Cir. 1985) (materials containing "arguments against the constitutionality and legality of the federal tax system" and "detailed instructions" on how to evade taxes); see also *United States* v. *Estate Pres. Servs.*, 202 F.3d 1093, 1106 (9th Cir. 2000); *United States* v. *Kaun*, 827 F.2d 1144, 1152 (7th Cir. 1987); *United States* v. *Buttorff*, 761 F.2d 1056, 1066-1068 (5th Cir. 1985).

Crucially, the preliminary injunction issued by the district court did not directly enjoin petitioner from disseminating his book, but instead merely prohibited petitioner from, *inter alia*, "[a]dvertising, marketing, or promoting any false, misleading or deceptive tax position in any media for the purpose of advising or encouraging taxpayers to unlawfully evade the assessment or payment of federal income taxes." Pet. App. 63. Petitioner thus remains free to disseminate his book without

material that is covered by the injunction.[2] And petitioner remains free to engage in other forms of "legitimate tax-related activities or advocacy," pending the district court's determination as to whether a permanent injunction is warranted. *Id.* at 62.

3. Finally, petitioner contends (Pet. 17-18) that the injunction is overbroad as applied to his book because the injunction separately enjoins him from selling the other products that the book promotes. This Court, however, traditionally refuses to consider arguments that were neither pressed in nor passed upon by the court of appeals. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993). In any event, petitioner's argument lacks merit. To the extent that petitioner's book promotes products whose sale would now be prohibited by the injunction, it contains "speech proposing an illegal transaction," which (like fraudulent or deceptive speech) "a government may regulate or ban entirely." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982). Petitioner cites no authority for the contrary proposition.

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[2] As a practical matter, petitioner could readily remove the offending material from his book because he publishes it himself. Moreover, as the district court noted (Pet. App. 48), the commercial speech contained in the book does not finance its publication.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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